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VIA ELECTRONIC MAIL

Radhika Fox
Assistant Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20004
fox.radhika@epa.gov

Deborah Jordan
Acting Regional Administrator, Region 9
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105
Jordan.Deborah@epa.gov

Re: Designation of the Rosemont Mine Site as a “Special Case” Due to the Unacceptable Adverse Impacts to Aquatic and Tribal Cultural Resources.

Dear Ms. Fox and Ms. Jordan,

Southern Arizona’s Santa Rita Mountains—the site of the proposed Rosemont open-pit copper mine—contain some of the highest-quality streams and ecosystems in the desert southwest, whose waters and wildlife have sustained Native American cultural and religious life for over 10,000 years. Given the significance of this area, the Environmental Protection Agency (EPA) has steadfastly opposed a Clean Water Act Section 404 Permit for the Rosemont mine because the “environmental consequences are substantial and unacceptable and contrary to the goals of the CWA.”¹ The U.S. Army Corps of Engineers (Corps), however, circumvented that finding by abruptly issuing two jurisdictional determinations (JDs) that eliminate Clean Water Act protections at the mine site. The Corps not only abdicated its obligation to consult with Tribes or EPA before issuing these JDs; it also misrepresented the facts and relied on a definition of Waters of the United States vacated by two federal courts. If left to stand, those JDs would allow Rosemont to destroy hundreds of acres of jurisdictional waters without any federal Clean Water Act permit.

The Tohono O’odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively, the Tribes) respectfully urge EPA to designate the Rosemont mine site as a “special case” and issue a final jurisdictional determination restoring Clean Water Act protections.² EPA should exercise

¹ Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Env’t Prot. Agency, to Edwin S. Townsley, Operations and Regul. Div. Chief, S. Pac. Div., U.S. Army Corps of Eng’rs, Environmental Consequences of the Proposed Rosemont Copper Mine: Significant Degradation to Waters of the United States at 32 (Nov. 30, 2017) [hereinafter “EPA 2017 Significant Degradation Letter”].

² See U.S. Army Corps of Eng’rs & Env’t Prot. Agency, Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f) § III (1989), <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and> [hereinafter “1989 MOA”].

this authority due to the “significant issues [and] technical difficulties” that pervade the Corps’ flawed JDs. By designating the mine site as a special case, EPA can ensure compliance with the Clean Water Act and fulfill the Biden Administration’s commitment to strengthen Nation-to-Nation relationships through “regular, meaningful, and robust consultation.”³ The Tribes welcome the opportunity to meet with you to discuss a path forward.

A. The Proposed Rosemont Mine Would Significantly Degrade Waters of the United States that Flow Through the Santa Rita Mountains.

The Santa Rita Mountains, or *Ce:wi Duag* (“Long Mountain” in the O’odham language), is a landscape imbued with cultural significance—a location of sacred sites, ancestral villages and burial sites, and a source of plant and animal resources critical to maintaining traditional O’odham culture. For thousands of years, tribal members have used these mountains to reflect, pray, and connect with their cultural history. The photo below depicts Ofelia Uva Rivas, a Tohono O’odham tribal member, near the site of the proposed mine.



³ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>; *see also* Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000) (requiring that “[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications”).

The Santa Rita Mountains also contain some of the highest-quality streams and wetland ecosystems in the American Southwest. For over a decade, the Corps and Hudbay agreed that there were at least 101.6 acres of potentially jurisdictional waters on the East Side of the Rosemont Mine site, including 154 individual ephemeral streams and springs that encompass 18 stream miles and two wetlands.⁴ Due to the presence of these waters, Hudbay cannot construct its proposed mine without obtaining a Section 404 Permit.

EPA, the Tribes, and vast majority of the public have vigorously opposed a Section 404 permit for the proposed mine. EPA concluded that the mine’s “environmental consequences are substantial and unacceptable and contrary to the goals of the [Clean Water Act].”⁵ EPA found that the direct impacts of the mine—the destruction of 18 miles of streams at the mine site, including approximately 40.4 acres of jurisdictional waters—would significantly degrade the aquatic environment.⁶ EPA also documented the extensive secondary impacts of mine construction and operation from the loss of crucial surface flows, heavy metal runoff, and groundwater drawdown.⁷ These impacts would “cause serious degradation or complete destruction of special and regionally unique aquatic resource areas downstream of the project,” including to Outstanding Arizona Waters at Cienega Creek and Davidson Canyon.⁸

The U.S. Forest Service also documented the fact that the proposed mine would cause “severe, irreversible, and irretrievable” impacts to tribal cultural resources.⁹ The proposed Rosemont Mine “would destroy [the Tribes’] historical and cultural foundation, diminish tribal members’ sense of orientation in the world, and destroy part of their heritage.”¹⁰

On March 24, 2021, however, the Corps used the Navigable Waters Protection Rule to sidestep these findings. It hastily issue two JDs that exclude all of the waters on the east and west side of mine site from the Clean Water Act’s protections.¹¹ To fast-track these negative JDs, the Corps abruptly revoked its pending offer to consult with the Tribes and, more broadly, reversed its long-standing policy requiring consultation with tribes prior to issuing JDs.¹² The

⁴ WestLand Resources, Inc., Preliminary Jurisdictional Determination for the Rosemont Project, Pima County, Arizona at 4 (2009) [hereinafter “PJD”].

⁵ EPA 2017 Significant Degradation Letter at 32.

⁶ *Id.* at 1.

⁷ *Id.* at 1–3, 9–20.

⁸ *Id.* at 37.

⁹ U.S. Forest Serv., Final Environmental Impact Statement for the Rosemont Copper Project Vol. 3 at 1036 (2013).

¹⁰ *Id.* at 1037.

¹¹ See U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination Form, SPL-2008-00816-MB (East Area) (March 24, 2021); U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination Form, SPL-2008-00816-MB (West Area) (March 24, 2021).

¹² Memorandum from R.D. James, Assistant Sec’y of the Army, U.S. Army Corps of Eng’rs, to Commanding Gen., U.S. Army Corps of Eng’rs, U.S. Army Corps of Engineers Tribal Consultation Associated with a Draft Approved Jurisdictional Determination (Jan. 4, 2021).

Corps also rejected EPA’s request for formal coordination on the JDs, despite the significant concerns raised by EPA staff.¹³

Since the Corps issued the JDs, circumstances have changed significantly, underscoring the factual and legal flaws in the Corps’ analysis. Two separate federal courts vacated the Navigable Waters Protection Rule (“NWPR”), finding that it contains “fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of ‘waters of the United States.’”¹⁴ In addition, EPA documented a series of flaws in the Corps’ analysis and concluded that there are jurisdictional waters on the east side of the Rosemont mine site, even under the Navigable Waters Protection Rule.¹⁵ Lainie Levick also documented evidence of surface flows in 20 stream channels on the west side of the Santa Rita Mountains.¹⁶ Finally, the Corps withdrew its policy barring consultation with Tribes, recognizing its obligation “to engage in regular, meaningful, and robust consultation with Tribal Nations.”¹⁷

Nonetheless, the Corps refuses to reopen the JDs, claiming that they remain valid for five years—even though courts have held that the rule under which they were issued was unlawful. No ground-disturbing activities have taken place on the mine site.¹⁸

B. EPA Should Exercise its “Special Case” Authority to Restore Clean Water Act Protections.

Congress entrusted EPA with the ultimate responsibility to protect the Nation’s waters. Consistent with that mandate, the 1989 Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f), directs EPA to make final jurisdictional determinations in “special cases,” such

¹³ See Letter from Tomas Torres, Region 9 Dir., Water Div., U.S. Env’t Prot. Agency, to Colonel Julie A Balten, Commander & Dist. Eng’r, LA Dist., U.S. Army Corps of Eng’rs, Federal Coordination Regarding the Approved Jurisdictional Determination for Rosemont Copper Mine in Arizona (April 8, 2021) [hereinafter “EPA Letter on JD Consultation”].

¹⁴ *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021); *Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *3 (D.N.M. Sept. 27, 2021).

¹⁵ See Memorandum from Robert A. Leidy, Region 9 Wetlands Off., U.S. Env’t Prot. Agency, EPA Review of Los Angeles Corps District Memorandum for Record (March 24, 2021), Approved Jurisdictional Determination, East Review Area, Rosemont Copper Mine Project, Pima, Co, Arizona (May 7, 2021) [hereinafter “2021 EPA Review of Corps’ JDs”].

¹⁶ Lainie Levick, A Report to Save the Scenic Santa Ritas (Nov. 8, 2021), attached as Exhibit 1.

¹⁷ Memorandum from Jaimie A. Pinkham, U.S. Army Corps of Eng’rs, to Commanding Gen., U.S. Army Corps of Eng’rs, Rescission of Previous Guidance — Tribal Consultation Associated with Approved Jurisdictional Determinations (April 20, 2021) [hereinafter “Corps Previous Guidance Rescission”].

¹⁸ Rosemont must notify the Corps and initiate a review of the 404 Permit if it plans to proceed based on the JDs. See Letter from Colonel Julie A. Balten, U.S. Army, to Matt Bingham, Hudbay Minerals, Inc., East Area Approved Jurisdictional Determination (March 24, 2021).

as where “significant issues or technical difficulties are anticipated or exist.”¹⁹ The Rosemont mine site presents a series of significant issues and technical difficulties, underscoring the pressing need for EPA to make a final jurisdictional determination for both the east and west sides of the Rosemont mine site, including the proposed Copper World expansion.²⁰

As a threshold matter, two federal courts vacated the Navigable Waters Protection Rule due to its “fundamental [and] substantive flaws,” and the fact that leaving it in place “would risk serious environmental harm.”²¹ In light of those decisions, the Agencies “halted implementation of the Navigable Waters Protection Rule” and are now applying the pre-2015 Regulations to ensure that the Nation’s waters receive Clean Water Act protections.²² EPA should exercise its special-case authority to reopen the JDs and undertake a site-specific analysis under the pre-2015 regulations to determine the extent of jurisdictional waters on the site.

The JDs also suffer from a series of errors, further highlighting the need for EPA to undertake its own independent analysis. EPA found that the Corps’ jurisdictional analysis “is flawed in several crucial areas leading to erroneous conclusions regarding jurisdictional waters within the East Review Area.”²³ In fact, EPA concluded that there are jurisdictional waters on the east side of the Rosemont mine site, even under the Navigable Waters Rule.²⁴ Lainie Levick also prepared a report documenting the presence of surface flows along 20 ephemeral streams on the west side of the Santa Rita mountains, including streams that would be impacted by the utility corridor and west-side operations, including the proposed Rosemont Copper World expansion.

Compounding these technical errors, the Corps failed to comply with the requisite process for ensuring sound jurisdictional determinations, as set forth in the 1989 Memorandum of Agreement with EPA. In particular, the Corps refused to formally coordinate with EPA, and thereby failed to address the significant flaws in its analysis.²⁵

¹⁹ 1989 MOA § III.

²⁰ This request encompasses the 8,676-acre Rosemont mine site on the east side of the Santa Rita Mountains, the 757 acres on the west side that encompass the utility corridor and operations for the Rosemont mine, and the approximately 3,430 acres on the west side that encompass the Rosemont Copper World expansion project (as set forth in the Rosemont Copper World Land Reclamation Plan, issued in August 2021).

²¹ *Pascua Yaqui Tribe*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5; *Navajo Nation*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *3–4 (remanding the Rule with vacatur due to the “seriousness of the NWPR’s deficiencies” and the “very real possibility of serious environmental harm”).

²² See U.S. Env’t Prot. Agency, *About Waters of the United States*, <https://www.epa.gov/wotus/about-waters-united-states#guidance> (last updated Sept. 3, 2021).

²³ See 2021 EPA Review of Corps’ JDs at 3.

²⁴ See *id.* at 3–4.

²⁵ EPA Letter on JD Consultation.

In addition, the Corps violated its obligation to engage in government-to-government consultation with the Tribes, as set forth in Executive Order 13,175.²⁶ In fact, rather than consulting with the Tribes—as promised—the Corps abruptly revoked its pending offer to consult with the Tribes, so that it could fast-track the JDs. The Corps attempted to justify this end-run based on a fundamentally flawed and irresponsible policy statement that was promptly withdrawn by the Corps.²⁷ The Biden Administration has since reaffirmed its commitment to Tribal Nations by, among other things, making “robust consultation” a “priority” and “cornerstone[] of Federal Indian Policy.”²⁸ EPA can fulfill that obligation through the special-case process.

Finally, EPA concluded that the proposed mine would cause significant degradation to jurisdictional waters, including Special Aquatic Sites. EPA stated, in no uncertain terms, that these “environmental consequences are substantial and unacceptable and contrary to the goals of the [Clean Water Act].”²⁹ EPA should undertake its own jurisdictional analysis to ensure compliance with the Clean Water Act and protect some of the most valuable streams and wetland ecosystems in the desert southwest..

Given these significant issues, and the irreplaceable resources at stake, the Tribes respectfully request an opportunity to meet with you to discuss EPA’s authority to designate the Rosemont site as a special case and make a final jurisdictional determination in compliance with the Clean Water Act. We can be reached at the email addresses listed below.

/s/ Stuart Gillespie
Stuart C. Gillespie
Heidi J. McIntosh
Caitlin Miller
Staff Attorney
Earthjustice, Rocky Mountain Office
633 17th Street, Suite 1600
Denver, CO 80202
T: 303.996.9616
F: 303.623.8083
sgillespie@earthjustice.org
hmcintosh@earthjustice.org
cmiller@earthjustice.org

*Counsel for the Tohono O’odham Nation,
Pascua Yaqui Tribe, and Hopi Tribe*

²⁶ See Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2020).

²⁷ Corps Previous Guidance Rescission.

²⁸ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021).

²⁹ EPA 2017 Significant Degradation Letter at 32.

cc: Marianne Engleman Lado
Deputy General Counsel for Environmental Initiatives
EngelmanLado.Marianne@epa.gov

John Goodin
EPA, Office of Wetlands, Oceans, and Watersheds
goodin.john@epa.gov

Damaris Christensen
Office of Water, Oceans, Wetlands, and Communities Division
Christensen.Damaris@epa.gov